(2)

Supreme Court, U.S.
FILED
JUN 24 2004
OFFICE OF THE CLERK

No. 03-1487

In the Supreme Court of the United States

LISA FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" for purposes of the mail fraud statute to include "a scheme or artifice to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether Congress had constitutional authority to predicate a mail fraud offense on an intrastate delivery by a private carrier.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Chapman v. *United States*, 500 U.S. 453 (1991)	6
Cleveland v. *United States*, 531 U.S. 12 (2000)	7
Houston, E. & W. Tex. Ry. v. *United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914)	14
Kolender v. *Lawson*, 461 U.S. 352 (1983)	8-9
McNally v. *United States*, 483 U.S. 350 (1987)	7, 8
Parker v. *Levy*, 417 U.S. 735 (1974)	7
Perez v. *United States*, 402 U.S. 146 (1971)	13
Rise v. *United States*, 124 S. Ct. 2412 (2004)	9
Screws v. *United States*, 325 U.S. 91 (1945)	8
Southern Ry. v. *United States*, 222 U.S. 20 (1991)	14
United States v. *Baker*, 82 F.3d 273 (8th Cir.), cert. denied, 519 U.S. 1020 (1996)	14, 15
United States v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 522 U.S. 1028 (1997)	6, 11
United States v. *Bryan*, 58 F.3d 933 (4th Cir. 1995)	11
United States v. *Castro*, 89 F.3d 1443 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997)	9
United States v. *Frega*, 179 F.3d 793 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000)	9
United States v. *Gil*, 297 F.3d 93 (2d Cir. 2002)	13
United States v. *Gilbert*, 181 F.3d 152 (1st Cir. 1999)	15
United States v. *Gray*, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997)	9

Cases—Continued: Page

United States v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002) 9
United States v. *Hausmann*, 345 F.3d 952 (7th Cir. 2003), cert. denied, 124 S. Ct. 2412 (2004) 9
United States v. *Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976) 8
United States v. *Lanier*, 520 U.S. 259 (1997) 6
United States v. *Lopez*, 514 U.S. 549 (1995) 13, 14
United States v. *Mandel*, 591 F.2d 1347 (4th Cir.), aff'd, 602 F.2d 653 (1979), cert. denied, 445 U.S. 961 (1980) 8
United States v. *Marek*, 238 F.3d 310 (5th Cir.), cert. denied, 534 U.S. 813 (2001) 14
United States v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983) 11
United States v. *Martin*, 195 F.3d 961 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000) 11
United States v. *Mazurie*, 419 U.S. 544 (1975) 6
United States v. *Morrison*, 529 U.S. 598 (2000) 13
United States v. *Panarella*, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002) 8, 10, 11
United States v. *Paradies*, 98 F.3d 1266 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997) 7, 8, 9
United States v. *Photogrammetric Data Servs., Inc.*, 259 F.3d 229 (4th Cir. 2001), cert. denied, 535 U.S. 926 (2002) 13
United States v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003), petition for cert. pending, No. 03-1375 (filed Mar. 29, 2004) 9, 10
United States v. *Sawyer*, 239 F.3d 31 (1st Cir. 2001) 11
United States v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) 12
United States v. *Szur*, 289 F.3d 200 (2d Cir. 2002) 9

Cases—Continued: Page

United States v. *Waymer*, 55 F.3d 564 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996) 4
United States v. *Welch*, 327 F.3d 1081 (10th Cir. 2003) 9
United States v. *Woodward*, 149 F.3d 46 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999) 8

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 12, 13, 14, 15
Amend. I 4
Amend. X 12
Travel Act, 18 U.S.C. 1952(a) 15
18 U.S.C. 371 2
18 U.S.C. 844(e) 15
18 U.S.C. 1001 2
18 U.S.C. 1341 ..... 2, 4, 7, 8, 12, 13
18 U.S.C. 1346 ..... 4, 5, 6, 7, 8, 9, 10, 11, 12
18 U.S.C. 1958 14

In the Supreme Court of the United States

No. 03-1487

LISA FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 340 F.3d 1261.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2003. A petition for rehearing was denied on January 27, 2004 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on April 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to commit mail

fraud, in violation of 18 U.S.C. 371; five counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of making a false statement to an investigative agent, in violation of 18 U.S.C. 1001. She was sentenced to six months of imprisonment. The court of appeals affirmed petitioner's convictions but vacated her sentence and remanded for resentencing. Pet. App. 1a-29a.

1. The Palm Beach County Housing Finance Authority (HFA) is a governmental entity chartered under Florida law to fund low-cost housing. Lloyd Hasner, petitioner's co-defendant, was the chairman of the HFA. Petitioner Lisa Fisher was an associate with Main Street Realty and owned Lisa Fisher & Company, a real estate consulting firm. Pet. App. 2a.

At an HFA meeting in September 1996, Hasner proposed that petitioner be hired as a consultant. Petitioner was subsequently retained by Hawthorne Ltd., a developer of low-income housing projects, to find potential sites in Florida. Petitioner contacted Hasner about the availability of potential project sites. In November 1996, Hasner and petitioner reached an oral understanding for the sale of a parcel of land, later known as Chelsea Commons, to Hawthorne for $1.8 million. Under the agreement, the seller's broker and petitioner would each pay Hasner a referral fee of $4500. In addition, Main Street Realty agreed to pay Hasner a referral fee of 1% of the purchase price, or $18,000. Pet. App. 2a-3a.

At a subsequent HFA meeting, it was announced that Hawthorne had secured a potential development site and wished to enter a proposal for the development of a publicly-funded affordable housing project. At the same meeting, the HFA, including Hasner, unanimously approved petitioner's consulting contract with HFA. Neither petitioner nor Hasner disclosed that, if

the Chelsea Commons sale was completed, Hasner would receive a referral fee. Pet. App. 3a-4a.

In December 1996, the HFA voted to proceed with the Chelsea Commons development. Pet. App. 4a. Hasner recused himself from voting on the matter because of a "potential conflict" of interest, but he did not disclose the nature of the conflict. *Ibid.* At a June 1997 HFA meeting, before the final vote on the Chelsea Commons project, an HFA member asked to be advised on conflicts of interest involving the project. *Id.* at 5a. Neither Hasner nor petitioner informed the HFA that Hasner was to receive a $27,000 referral fee in connection with the project. *Ibid.*

The closing statement for the Chelsea Commons project reflected that Hasner would receive a $9000 payment but did not reflect the additional $18,000 payment he was to receive from Main Street Realty. HFA's bond counsel and the developer's attorney subsequently determined that the $9000 payment violated the conflict-of-interest provisions of Florida law, and they withheld their approval of the issuance of approximately $16 million in tax-exempt bonds to finance the project if the payment was not repudiated. Hasner signed a letter disavowing his interest in the $9000 fee after petitioner agreed to pay him the fee from an unrelated project called Tierra Vista. After receiving Hasner's letter, the attorneys approved the bonds. Petitioner did not provide Main Street Realty with a copy of the disavowal letter or her handwritten assurance to Hasner that he would be paid his commission out of the Tierra Vista project. Hasner received his referral fee via an intrastate Federal Express delivery. Pet. App. 6a-8a.

2. The federal mail fraud statute prohibits the use of the mails, or of "any private or commercial interstate

carrier," to execute or further "any scheme or artifice to defraud." 18 U.S.C. 1341. The term "scheme or artifice to defraud" is defined to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. The theory of the instant mail fraud prosecution was that Hasner had deprived HFA of his honest services by voting on petitioner's consulting contract and allowing the Chelsea Commons project to be approved without disclosing the agreement he had with petitioner to receive a referral fee in connection with the project. Although petitioner herself had no duty of loyalty to HFA, the government argued that she had caused Hasner to violate his duty of honest services as a public official. See Pet. App. 17a.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-29a.[1]

a. The court of appeals rejected petitioner's contention that 18 U.S.C. 1346 is unconstitutionally vague. Pet. App. 10a-12a. Because petitioner's vagueness challenge did not raise a First Amendment issue, the court of appeals reviewed the constitutionality of Section 1346 only as applied to the conduct for which petitioner was convicted. *Id.* at 11a. The court observed that a statutory requirement of "willful or purposeful" conduct serves to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Ibid.* (quoting *United States* v. *Waymer*, 55 F.3d 564, 568 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996)). The court concluded that, because "the government was required to prove specific

---

[1] The court of appeals vacated petitioner's sentence and remanded for resentencing, holding that the district court had erred in imposing a four-level enhancement in petitioner's base offense level under the Sentencing Guidelines. Pet. App. 26a-27a.

intent to defraud," and "the jury concluded that [petitioner] specifically intended to deprive the public of Hasner's honest services," Section 1346 "was not unconstitutionally vague as applied to" petitioner's own conduct. *Id.* at 11a-12a.

b. The indictment in this case identified state ethics laws that were alleged to prohibit Hasner's receipt of the Chelsea Commons commission. Pet. App. 13a. At trial, however, the district court declined to instruct the jury about those state laws. *Id.* at 13a n.4. Petitioner contended on appeal that the indictment's reliance on the state ethics statutes was improper because those state laws "have not been similarly applied and have no criminal or civil penalties." *Id.* at 12a. She further argued that the district court had "constructively amended the indictment by not requiring the government to prove a violation of state ethics law." *Ibid.*

The court of appeals rejected those contentions. Pet. App. 12a-13a. The court explained that, "[a]lthough the indictment listed the state ethics statutes which purportedly prohibited Hasner from receiving the Chelsea Commons commission, the indictment did not rely upon violations of these state statutes as a basis for the honest services charges. Instead, the indictment focused on Hasner's unjust enrichment while he served as chairman of the HFA and on the concealment of Hasner's financial relationship with [petitioner]." *Id.* at 13a. The court concluded that "the inclusion of the state statutes in the indictment was mere 'surplusage,'" and that the district court's refusal to instruct the jury about those state laws therefore "did not result in an impermissible broadening of the indictment." *Ibid.*

c. Petitioner contended that the government had failed to demonstrate a sufficient connection between interstate commerce and the charged mail fraud and

conspiracy offenses because the jurisdictional predicate for those counts was an intrastate Federal Express delivery. The court of appeals rejected that argument. Pet. App. 14a. The court observed that the mail fraud statute expressly encompasses communications sent by "private or commercial interstate carrier[s]." *Ibid.* The court concluded that Congress has authority under the Commerce Clause to regulate private and commercial carriers as instrumentalities of interstate commerce, even with respect to conduct that takes place entirely intrastate. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 8-22) that 18 U.S.C. 1346 is unconstitutionally vague. The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997); see *United States* v. *Brumley*, 116 F.3d 728, 732 (5th Cir.) (en banc) ("Gauging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code."), cert. denied, 522 U.S. 1028 (1997). Under this Court's precedents, petitioner may not attack Section 1346 as unconstitutionally vague simply by showing that hypothetical situations may exist in which the statute would be ambiguous. Rather, she can prevail only by showing that the statute failed to provide clear warning that her own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * * so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness chal-

lenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Section 1346 is not vague as applied to the conduct for which petitioner was convicted.

a. The mail fraud statute makes it a crime to use the United States mails, or "any private or commercial interstate carrier," to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive citizens of the "intangible right" to the honest services of public officials. See *United States* v. *Paradies*, 98 F.3d 1266, 1283 n.30 (11th Cir. 1996) (collecting cases), cert. denied, 522 U.S. 1014 (1997). In *McNally*, this Court rejected the "intangible rights" theory of mail fraud prosecution, holding that the mail fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360.

Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." The lower federal

courts have consistently recognized that Section 1346 extends the coverage of the mail fraud statute to acts that deprive the public of its right to a public official's honest services, such as an official's concealment of a personal financial interest in a matter coming before him in his official capacity. See, *e.g.*, *United States* v. *Panarella*, 277 F.3d 678, 694-695 (3d Cir.), cert. denied, 537 U.S. 819 (2002); *United States* v. *Woodward*, 149 F.3d 46, 62 (1st Cir. 1998), cert. denied, 525 U.S. 1133 (1999).

b. At the time of petitioner's offenses, there was ample precedent indicating that the conduct in which petitioner and Hasner engaged violated Section 1346, and that interpretation is consistent with the scope of the honest services doctrine as the lower courts had applied it to public officials before this Court's decision in *McNally*. See *Panarella*, 277 F.3d at 694-695 (citing *United States* v. *Mandel*, 591 F.2d 1347, 1363 (4th Cir.), aff'd, 602 F.2d 653 (1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Keane*, 522 F.2d 534, 546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976)). In addition, Section 1341 protects defendants from criminal liability for an accidental misrepresentation or omission by requiring that the jury find a specific intent to defraud beyond a reasonable doubt. *Paradies*, 98 F.3d at 1285. That requirement does much to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945) (plurality opinion).

Section 1346 and the cases construing it thus provided petitioner with fair notice that her conduct was criminal, and the application of the statute in the factual circumstances of this case did not "encourage arbitrary and discriminatory enforcement" of the statute. *Kolen-*

der v. *Lawson*, 461 U.S. 352, 357 (1983). With the exception of one case that was later overruled, the courts of appeals have uniformly rejected vagueness challenges to Section 1346. See *United States* v. *Rybicki*, 354 F.3d 124, 142-143 (2d Cir. 2003) (en banc), petition for cert. pending, No. 03-1375 (filed Mar. 29, 2004); *United States* v. *Hausmann*, 345 F.2d 952, 958 (7th Cir. 2003), cert. denied, 124 S. Ct. 2412 (2004); *United States* v. *Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *Paradies*, 98 F.3d at 1282-1283; *United States* v. *Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).[2] On June 1, 2004, this Court denied the certiorari petition in *Rise* v. *United States*, No. 03-1088 (124 S. Ct. 2412), which also presented a vagueness challenge to Section 1346. There is no reason for a different result here.

c. In support of her vagueness challenge to Section 1346, petitioner relies (see Pet. 12-18) on decisions from other circuits that, in her view, employed standards for

---

[2] In *United States* v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002), the only case in which a vagueness challenge to Section 1346 has been upheld, the court concluded that the statute was impermissibly vague as applied to a private bid contractor who willfully breached a contractual requirement that he pay the prevailing wage to his employees and who then misrepresented the wages on disclosure forms required to be filed under state law. *Id.* at 96-97. The Second Circuit, sitting en banc, subsequently overruled the constitutional holding in *Handakas* and concluded that the conduct at issue was not within the scope of Section 1346. See *Rybicki*, 354 F.3d at 144.

honest services fraud under which her conviction could not stand. Even if petitioner could establish a square circuit conflict over the scope of Section 1346's coverage, it would not follow that the statute is unconstitutionally vague. As the Second Circuit observed in *Rybicki*, "divergence in panel or circuit views of a statute, criminal or otherwise, is inherent—and common—in our multi-circuit system. Disparity does not establish vagueness." 354 F.3d at 143; see *Panarella*, 277 F.3d at 698 ("[O]ur criminal law contains numerous statutes whose construction and application pose difficulties in interpretation.").

Whether or not the interpretive issues identified by petitioner warrant clarification in another case, they do not here. Neither of the two questions presented by the petition for a writ of certiorari (see Pet. i) fairly includes any issue of statutory construction. And, while petitioner states (Pet. 22) that "[r]esolving [the circuit] conflicts and settling the important issue of the boundaries of [Section] 1346 is a compelling reason for this Court to grant certiorari," that request for clarification of the scope of Section 1346 appears logically inconsistent with petitioner's contention that the statute is fatally, unconstitutionally vague.

In any event, petitioner overstates the existence of any conflict over the applicability of Section 1346 to conduct of the sort in which she engaged. Petitioner relies in part (see Pet. 13-15) on the Second Circuit's statement in *Rybicki* that "in self-dealing cases, unlike bribery or kickback cases, there may also be a requirement of proof that the conflict [of interest] caused, or at least was capable of causing, some detriment" to the victim. 354 F.3d at 142. That statement was dictum, however, since the case before the court involved kickbacks and not conflicts of interest. See *ibid.* The court

in *Rybicki* also made clear that its entire discussion of the meaning of Section 1346 was limited to "private-sector" cases, stating that "[t]he meaning of the phrase 'scheme or artifice to defraud' with respect to public corruption cases is not at issue in the matter before us." *Id.* at 138-139; see *Panarella*, 277 F.3d at 699 (drawing distinction between private and public sector cases for purposes of construing Section 1346). In any event, the concealment of Hasner's conflict of interest *was* capable of causing detriment to the HFA, since it "potentially placed the bond issuance in jeopardy." Pet. App. 19a; see *id.* at 20a (explaining that the attorneys charged with reviewing the Chelsea Commons project for compliance with Florida law "refused to approve the issuance of the bonds without Hasner disavowing his commission").

In *United States* v. *Brumley*, 116 F.3d 728 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997) (see Pet. 16-17), the court of appeals concluded that a state official deprives his public employer of its right to his honest services only if the official "act[s] or fail[s] to act contrary to the requirements of his job under state law." 116 F.3d at 734. But the other courts of appeals that have addressed the issue have held that proof of a violation of state law is not necessary to establish a deprivation of honest services under 18 U.S.C. 1346. See *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001); *United States* v. *Martin*, 195 F.3d 961, 966 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000); *United States* v. *Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); see also *United States* v. *Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983). In any event, the Fifth Circuit's decision in *Brumley* does not suggest that Section 1346 is unconstitutionally vague simply because it fails to specify whether a depri-

vation of the honest services of a public official requires a violation of state law. See pp. 9-10, *supra*.

Petitioner's reliance (Pet. 17-18) on *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), is also misplaced. The court of appeals in *Sawyer* held that proof of a state-law violation generally is not necessary for conviction under 18 U.S.C. 1341 and 1346. See 85 F.3d at 725-726. The court in *Sawyer* found that proof of a state-law violation was needed in that case only because "the parties agree[d] that the indictment, as structured, required [the government] to prove that Sawyer violated at least one state law." *Id.* at 726. Here, by contrast, although petitioner's indictment listed the state ethics statutes that allegedly prohibited Hasner from receiving the undisclosed commissions, the court of appeals held that the indictment "did not rely upon violations of these state statutes as a basis for the honest services charges," and that the citation of the statutes was "mere 'surplusage.'" Pet. App. 13a. The court's determination that proof of state-law breaches was not required under those circumstances (see *id.* at 12a) is fully consistent with *Sawyer*.

2. The federal mail fraud statute expressly reaches the use of "any private or commercial interstate carrier" in furtherance of a "scheme or artifice to defraud." 18 U.S.C. 1341. The statute does not require proof that the matter deposited with such a carrier was transported across state lines. Petitioner contends (Pet. 22-30) that, as applied to intrastate deliveries by private or commercial carriers (such as the Federal Express delivery underlying one of the mail fraud counts and the conspiracy count in this case), Section 1341 exceeds Congress's authority under the Commerce Clause and thus violates the Tenth Amendment. That claim lacks merit and does not warrant this Court's review.

As petitioner acknowledges (Pet. 22, 29), each of the courts of appeals to address the issue directly has held that Section 1341 may constitutionally be applied to reach intrastate deliveries by an interstate commercial carrier. See Pet. App. 14a; *United States* v. *Gil*, 297 F.3d 93, 100 (2d Cir. 2002); *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 249-252 (4th Cir. 2001), cert. denied, 535 U.S. 926 (2002). Those decisions are consistent with the framework for Commerce Clause analysis set forth by this Court in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "activities that substantially affect interstate commerce." *Id.* at 558-559; see *United States* v. *Morrison*, 529 U.S. 598, 608-609 (2000). Application of the mail fraud statute to the intrastate use of private and commercial interstate carriers is a permissible exercise of congressional authority under the second *Lopez* category, as a regulation and protection of the instrumentalities of interstate commerce. As the Fourth Circuit explained, "when Congress acts to regulate or protect an instrumentality of interstate commerce under the second *Lopez* category, federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement, and federal jurisdiction based on *intra* state use of *inter* state facilities is an appropriate exercise of the commerce power." *Photogrammetric Data Servs., Inc.*, 259 F.3d at 250 (citations and internal quotation marks omitted).

While acknowledging that Congress has power to regulate instrumentalities of interstate commerce and to protect them from direct harm, petitioner contends (Pet. 27-28) that Congress is not authorized to prevent the misuse of those instrumentalities in furtherance of crimes such as fraud. Petitioner is correct that the cases cited in *Lopez* (see 514 U.S. at 558) as examples of the second category of permissible Commerce Clause legislation—*Houston, East & West Texas Railway* v. *United States* (*Shreveport Rate Cases*), 234 U.S. 342 (1914); *Southern Railway* v. *United States*, 222 U.S. 20 (1911); and *Perez* v. *United States*, 402 U.S. 146 (1971) —each involved direct regulation of an instrumentality of interstate commerce or an effort to protect the instrumentality from direct harm. In listing such examples, however, the *Lopez* Court did not purport to define the outer boundaries of congressional authority under the second *Lopez* category.

In applying the principles set forth in *Lopez*, the courts of appeals have consistently understood Congress's power to protect instrumentalities of interstate commerce to include the power to prevent criminal misuse of such facilities, even where the misuse does not directly harm the instrumentality. In *United States* v. *Marek*, 238 F.3d 310, 317 (en banc), cert. denied, 534 U.S. 813 (2001), the Fifth Circuit upheld a conviction under the federal murder-for-hire statute, 18 U.S.C. 1958, based on the defendant's intrastate use of Western Union facilities to transfer payment to a hit man. The court explained that Section 1958 was valid as applied "because intrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power." 238 F.3d at 318. In *United States* v. *Baker*, 82 F.3d 273, cert. denied, 519 U.S. 1020 (1996), the Eighth Circuit affirmed a conviction under the

Travel Act, 18 U.S.C. 1952(a), based on the intrastate use of an automatic teller machine (ATM) that was part of an interstate network of such machines. Although the crime caused no direct harm to the ATM network, the court sustained the conviction under the second *Lopez* category, on the ground that the machine was a facility in interstate commerce. 82 F.3d at 275-276. In *United States* v. *Gilbert*, 181 F.3d 152 (1st Cir. 1999), the defendant was convicted of using a telephone to make a bomb threat, in violation of 18 U.S.C. 844(e). Although there was no evidence that the telephone call was made interstate or caused direct harm to the telephone system, the court upheld the conviction against a Commerce Clause challenge. 181 F.3d at 157-159. The court explained that "a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce." *Id.* at 158. Petitioner identifies no contrary authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

JUNE 2004